No. 45716-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE PERSONAL RESTRAINT OF
JON A. STEVENS,

Petitioner.

BRIEF IN SUPPORT OF TRANSFERRED Cr R 7.8 MOTION/PERSONAL RESTRAINT PETITION

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1. Jon Andrew Stevens is under restraint as a result of a conviction and sentence.

2. The restraint Stevens is suffering is unlawful under RAP 16.4(c)(2), because the failure to give him good-time credit for time served on a Washington sentence concurrent with a sentence being served in Idaho violated his state and federal constitutional rights to equal protection under in In re Salinas, 130 Wn. App. 772, 124 P.3d 665 (2005).

3. The government has not shown that Salinas is "demonstrably incorrect or harmful" or should not be followed despite the strong policy of *stare decisis*.

4. Stevens should be granted to relief from the unlawful restraint he is suffering.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is petitioner under restraint as defined in RAP 16.4(b) when, as a result of his conviction after trial, he is currently in custody as a result of a judgment and sentence?

2. In Salinas, supra, the Court held that the Department of Corrections ("DOC") violated an inmate's equal protection rights when it refused to give him credit for earned early release time against the portion

of a Washington state sentence served in another state concurrent to an out-of-state sentence even though it awarded such credit for other inmates. Here, DOC denied Petitioner Stevens credit for earned early release time against the portion of a Washington state sentence served in Idaho concurrent to an Idaho sentence. Is the resulting restraint Stevens is suffering unlawful under Salinas?

3. DOC urges this Court to ignore the holding of Salinas, based largely upon arguments the Salinas Court rejected. Should this Court decline DOC's invitation when DOC has not shown that Salinas is incorrect or harmful?

4. Should DOC's arguments further be rejected because DOC mistakes the correct legal standards which apply?

5. Should the Court decline to apply the incorrect standards set forth in the prosecution's briefing?

C. STATEMENT OF THE CASE

1. Procedural facts

Jon A. Stevens, Petitioner, was charged by and pled guilty to an amended information filed in Pierce County Superior Court on March 12, 2012, with first-degree identity theft, second-degree theft and two counts of second-degree identity theft. CP 1-2, 4-12; RCW 9.35.020(1) and (3); RCW 9A.56.020(1)(b); RCW 9A.56.040(1)(a).

That same day, the Honorable Judge Kathryn J. Nelson accepted the plea and ordered a standard-range sentence. CP 12, 26. The Warrant of Commitment was vacated the following day when Stevens was apparently sent to Idaho to serve a sentence there. See CP 29-31.

On May 1, 2013, the Honorable Katherine J. Stolz entered a new Warrant of Commitment. CP 30-31. On September 30, 2013, Mr. Stevens filed a pro se Motion for Order of Good Time Credits. CP 32-35. On December 3, 2013, Judge Nelson ordered the motion transferred to this Court to be considered as a Personal Restraint Petition. CP 36-37.

The Pierce County Prosecutor's Office filed a response to the PRP on behalf of the Pierce County Jail on May 19, 2014. ("BORP"). On June 5, 2014, the Department of Corrections (DOC) filed its response ("BORD"). The Court appointed counsel and this pleading follows.

2. Facts relating to issues raised in petition

The Statement of Defendant on Plea of Guilty indicated that, in exchange for Mr. Stevens giving up important constitutional rights such as the right to trial by jury, the prosecution would recommend, in relevant part, the following sentence:

> 63 months prison. Concurrent with Idaho 04-B0388 from 3/30/11 forward (348 days)[.] 12 months comm cust[.] No contact with victim. Restitution by later order[.] Consecutive to Federal sentence already served[.]

CP 8. On March 12, 2012, in originally sentencing Stevens, Judge Nelson ordered 63 months of total confinement, "concurrent w/Idaho case 04-B0388 from 3/30/11," but "consecutive to [a] federal sentence." CP 22-23. 348 days of credit were given for time served prior to entry of the plea. CP 23-24.

The following day, the court entered an "Order Vacating Warrant of Commitment," stating it was vacating the Warrant of Commitment entered the day before "upon joint motion of the parties, and pursuant to the Interstate Agreement on Detainers (RCW 9.100)[.]" CP 29.

On May 1, 2013, the parties appeared before Judge Stolz. RP 3. The prosecutor told the court that, after the original sentencing, an order was entered vacating the warrant of commitment "in order for the defendant to serve out other sentences," which the prosecutor described as "the Federal case and an Idaho case." RP 3. The prosecutor also said that Stevens had been before the court "on an IAD" as an "extradition case." RP 3. Counsel similarly described the situation as Stevens having been "transported out of state" so that he could "finish up his matters" there. RP 3-4.

The prosecution then handed the court a proposed Warrant of Commitment. RP 3. The court established that "credit for time served" was now 415 days and then signed the Warrant of Commitment, which

provided, in relevant part:

> CALCULATION OF CREDIT FOR TIME SERVED:
>
> The defendant was incarcerated in the IDAHO DEPARTMENT OF CORRECTIONS on charges from the State of IDAHO. The defendant exercised his rights under the Interstate Agreement on Detainers. On APRIL 30, 2013, the defendant was returned to Pierce County and sentenced under this cause number and given credit for 348 DAYS ([s]ee Judgment and Sentence entered with court on MARCH 12, 2012). The defendant completed his sentence under IDAHO cause # 04-B0388 and is now being remanded to the Washington State Department of Corrections to serve time under this cause. The defendant's credit for time served is calculated from March 12, 2012 to MAY 1, 2013[,] WHICH TOTALS: 415 DAYS. Thereby the court orders the defendant's total credit for time served shall be 763 days.

CP 20-31.

On September 30, 2013, Mr. Stevens filed a pro se motion, asking to have good time credits applied to his Washington sentence for when he was serving that sentence in Idaho. CP 32. Stevens argued that both DOC and the Pierce County Jail were refusing to grant him the credits even though the trial court had imposed a concurrent sentence for the Washington offense. CP 32-33. Stevens complained that even though he qualified for and had earned 1/3 off his sentence, he was not getting it. CP 33-34. He was frustrated that he was being required to serve 51 months of the 63 month sentence imposed, thinking he should instead serve 42 months, if he was given 1/3 off for what he called "Good Conduct Time." CP 1-2.

On December 3, 2013, the trial court transferred the motion to this Court for consideration as a personal restraint petition, after first finding the petition was not "time-barred[.]" CP 36-37. The court checked "boxes" on a preprinted, boilerplate form order, as follows:

> A.[X] **IT IS HEREBY ORDERED** that this petition is transferred to the Court of Appeals, Division II, to be consider as a personal restraint petition. The petition is being transferred because:
>
> [ ] it appears to be time-barred under RCW 10.73.090;
>
> [ ] [it] is not time barred under RCW 10.73.090, but is untimely under CrR 7.8(a) and therefore would be denied as an untimely motion in the trial court, or
>
> [X] [it] is not time barred but does not meet the criteria under CrR 7.8(c)(2) to allow the court to retain jurisdiction for a decision on the merits.

CP 36-37.

After this Court received the transferred case, it ordered the state to respond. The prosecution filed a response on behalf of the Pierce County Jail. BORP at 1. The Attorney General's Office also filed a response on behalf of DOC. BORD at 1.

D. ARGUMENT

1. THIS COURT HAS THE AUTHORITY TO GRANT PETITIONER RELIEF FROM THE UNLAWFUL RESTRAINT HE IS SUFFERING

In his motion, Mr. Stevens has asked this Court for relief by asking to receive proper credit for "good time." As this case has now been

transferred as a personal restraint petition, Mr. Stevens is now reframing the argument to comply with the rules of appellate procedure regarding such pleadings and is asking this Court to grant him relief from the unlawful restraint he is suffering as a result of the sentence he is being ordered to serve based upon criminal conviction.

Under RAP 16.4, a petitioner is entitled to relief from a conviction when he is suffering restraint and the restraint is unlawful. RAP 16.4(b) and (c). If he is collaterally attacking a decision for which he has previously had an opportunity to appeal, there are court-imposed "threshold" requirements for relief, which are that a petitioner alleging constitutional error must show "actual and substantial" prejudice, and a petitioner alleging nonconstitutional error must show "a fundamental defect which inherently results in a complete miscarriage of justice." Personal Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). The burden of proof is on the petitioner and the standard of proof is not clear and convincing or beyond a reasonable doubt but rather the very low "preponderance of the evidence." See In re Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). If a petitioner can show that he is suffering unlawful restraint and meets the "threshold" requirements, he is entitled to relief.

In its response to Mr. Stevens' pro se Motion, the prosecution cites to "principles of finality" and the need for limiting "collateral relief," then

says that a petition must be dismissed "[i]f a petitioner fails to meet the threshold burden of showing actual prejudice from a constitutional error or a fundamental defect resulting in a miscarriage of justice." BORP at 4, 4 n.2.

But where, as here, there is no prior opportunity for judicial review of the decision, the court-imposed threshold requirements do not apply. See In re Isadore, 151 Wn.2d 294, 299, 88 P.3d 390 (2004); see also Brief of Respondent Department of Corrections ("BORD") at 4-5 (acknowledging that Stevens need only show he is under restraint and the restraint is unlawful). The prosecution errs in applying an incorrect standard and this Court should not follow the prosecution's declarations of the law on this point.

2. PETITIONER IS ENTITLED TO RELIEF

In this case, this Court should grant petitioner the relief he requests, because he is under restraint from the conviction and the restraint is unlawful.

a. Relief is proper

As a threshold matter, this Court is not precluded from granting petitioner's request for relief by RAP 16.4(d). That rule provides that relief may not be granted in a proceeding by way of personal restraint petition if there are other remedies available which are adequate under the

circumstances. RAP 16.4(d). Further, the rule provides that relief is limited by the provisions of RCW 10.73.090, .100 and .130. RAP 16.4(d).

None of those limits applies here. First, other remedies are inadequate under the circumstances. The time for a direct appeal of the warrant of commitment had passed when the motion was filed in the trial court.

Second, relief is authorized - or at least not prohibited - by RCW 10.73.090, .100 and .130. RCW 10.73.130 provides the offenses for which RCW 10.73.090 and .100 apply, while .090 and .100 provide specific time limits for bringing personal restraint petition. RCW 10.73.170; see RCW 10.73.090; RCW 10.73.100. Under RCW 10.73.090, a personal restraint petition is timely and this Court may grant relief where the petition is brought not more than a year after the judgment became final. RCW 10.73.090. Here, the warrant of commitment was only a few months old when Mr. Stevens filed his pro se Motion below, thus his request for relief was timely.

RCW 10.73.100 similarly does not apply. That statute waives the one-year time limit of RCW 10.73.090 in certain circumstances. But such waiver is only required if the one-year time limit has passed; as it has not passed here, RCW 10.73.100 does not apply. Personal Restraint of Johnson, 131 Wn.2d 558, 563, 933 P.2d 1019 (1997).

Thus, this Court is not precluded from granting petitioner's request for relief on this transferred motion.

b. Petitioner is suffering restraint

A petitioner is under "restraint" when he "has limited freedom because of a court decision. . . in a criminal proceeding," is confined or is under a disability as a result of a judgement and sentence in a criminal case. RAP 16.4(b); see also State v. S.M.H., 76 Wn. App. 550, 553, 887 P.2d 903 (1995). In this case, Mr. Stevens is under a restraint as a result of the conviction and sentence, because he is confined in prison as a result. See RAP 16.4(b).

c. The restraint is unlawful

The second requirement of RAP 16.4 is that petitioner must show that the restraint he is suffering is unlawful. Restraint resulting from a conviction is unlawful under RAP 16.4(c) when:

> (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding. . .in violation of the Constitution of the United States or the Constitution or laws of the State of Washington[.]

In this case, petitioner is entitled to relief under both of these subsections.

Mr. Stevens is entitled to relief because the failure to give him "good time" credit for the time he served his Washington conviction in Idaho is in violation of his state and federal rights to equal protection under

Article I, section 12 and the 14th Amendment.

At the outset, it is important to note that DOC misstates the law when it declares that Stevens has some burden of proving "arbitrary and capricious" conduct by DOC in this case. See BORD at 4-5. DOC claims that, "in challenges to a prison's time-credit calculations," the petitioner has the burden of showing "that DOC's actions were so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding so as to work to the offender's prejudice." BORD at 5.

But that is not the standard applicable here. The "fundamentally fair proceeding" standard DOC cites is used when a petitioner is challenging a prison disciplinary proceeding, as the very case cited by DOC makes clear. See In re Grantham, 168 Wn.2d 204, 205, 227 P.3d 285 (2010); see BORD at 5 (citing, Grantham). Because inmates have only limited due process rights in relation to prison disciplinary proceedings, they are only entitled to a "fundamentally fair proceeding," and must thus show that the disciplinary action complained of "was so arbitrary and capricious as to deny a fundamentally fair proceeding," in order to meet their burden of showing that any resulting restraint was unlawful. Grantham,168 Wn.2d at 205; see Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed.2d 935 (1974) (noting the minimal due process rights of the inmate in such circumstances).

But this case does not involve a challenge to a prison disciplinary proceeding. This case involves a challenge to DOC's refusal to credit Stevens with earned early release time for the portion of his Washington sentence served concurrently with an Idaho sentence while in an Idaho prison. And the constitutional principles at issue do not involve due process but rather equal protection. The "arbitrary and capricious" due process standard is irrelevant to this case.

DOC also mistakes the law when it argues that Turner v. Safley, 482 U.S. 78, 89-91, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), applies. DOC claims that, under Turner, the Court is precluded from evaluating "the content of the DOC's rule that IAD offenders are not allowed to earn early release credits while in another state unless the other state awards early release credits." BORD at 19. Further, DOC declares, under Turner, this Court's evaluation is limited, and based upon a four-part test, which is forgiving in light of the "asserted penological interest of maintaining order and discipline." BORD at 18-19.

But again, DOC is applying a legal standard which does not apply. Turner involved a class action brought on behalf of inmates challenging the state Department of Corrections rules on inmate marriage and inmate-to-inmate correspondence. 482 U.S. at 81-82. The Turner test applies when there is a "facial challenge to a prison policy." McNabb v. DOC, 163

Wn.2d 393, 404,180 P.3d 1257 (2008). As our highest court has held, Turner does not apply simply because a case involves an inmate. McNabb, 163 Wn.2d at 404. Instead, Turner "merely provided the framework for determining whether a prison regulation was reasonable on its face" when there is a "facial challenge to a prison policy." McNabb, 163 Wn.2d at 404-405.

This case does not involve a facial challenge to a prison policy. This case involves an argument that DOC deprived Stevens of his state and federal equal protection rights by refusing to give him earned early release credit against a Washington sentence served concurrently to an out-of-state sentence in an out-of-state facility while giving such credit to others also serving a Washington sentence concurrently to an out-of-state sentence in an out-of-state facility. The four-part Turner test does not apply.

After first spending a great deal of time trying to apply caselaw which does not apply, DOC then spends only a scant three paragraphs on the case which is actually directly on point - In re Salinas, supra. In Salinas, as here, the defendant was serving a sentence in another state and was returned briefly to Washington to enter a plea for a Washington crime. 130 Wn. App. at 774-75; CP 23-24, 29. The Washington court in Salinas, as here, ordered the Washington state sentence to run concurrently with the out-of-state sentence, and the defendant was returned to that other state - in

Salinas, South Dakota, while here it was Idaho. 130 Wn. App. at 774-75; CP 23-24, 29. Like in this case, South Dakota's prison system did not have a way it calculated earned early release, instead using a parole-type system. See id.

And just as here, in Salinas, when the defendant was returned back to Washington after having completed the sentence in the other state, DOC refused to give the defendant credit for any earned early release against the portion of the Washington sentence served while in the other state. 130 Wn. App. at 774-75.

In Salinas, the Court unequivocally found this practice to be a violation of the defendant's state and federal constitutional rights to equal protection. 130 Wn. App. at 774-75. The Court noted that other inmates are given such credits when they serve concurrent sentences and found no rational relationship between any legitimate governmental purpose and such disparate treatment. 130 Wn. App. at 775. The Court then described the other inmates who received earned early release time against a Washington sentence, if they 1) serve concurrent sentences entirely in Washington, or 2) serve a Washington sentence concurrent to an out-of state sentence in an out-of-court facility which has a policy for awarding earned early release, or 3) serve a sentence in an out-of-state facility under the Interstate Corrections Compact (ICC), "regardless of whether such

facilities have earned early release policies." 130 Wn. App. at 776.

At that point, the Court rejected DOC's claims that it was proper to refuse to give offenders such as Salinas credit against a Washington sentence for "earned early release" while giving such credit to others.

First, the Court was unswayed by DOC's claim that Salinas was not entitled to earned early release credit for the time served in South Dakota because that state did not have an earned early release "and no procedure for calculating any earned early release time." Id. The Court also rejected DOC's reliance on then RCW 9.94A.728(1), which provided, in relevant part, for reduction of a sentence of an offender

> committed to a correctional facility operated by the department may be reduced by earned release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined.

Salinas, 130 Wn. App. at 776-77. DOC argued that, under this statute, an offender is not entitled to earned early release time unless the out-of-state facility has policies and procedures in place which provide for earned early release credit. Id.

The Salinas Court, however, found that this interpretation of and application of the statute violated the Article I, section 12, and Fourteenth Amendment equal protection clauses. 130 Wn. App. at 777. Applying the very forgiving "rational relationship" test, the Court found no rational basis

to distinguish between the inmates who were getting earned early release credit for time served on concurrent sentences out-of-state versus those who did not. Id.

The Court was also unconvinced by DOC's protestations that it could not be responsible for figuring out such credit if the state in which the time was served did not do so. Id. Put simply, the Court held, while it was " no doubt easier to compare and transfer earned early release time in systems that explicitly provide inmates credit for such time," such "administrative inconvenience" was not a rational basic for "discriminating against this inmate[.]" 130 Wn. App. at 778.

Part of the Court's reason for rejecting DOC's protestations of inconvenience was the fact that DOC in fact engaged in such "inconvenience" with some inmates, even if the state in which they served a concurrent Washington sentence *did not have an earned early release system in place.* 130 Wn. App. at 778. The Salinas Court pointed out that, when an inmate was serving time out-of-state pursuant to the Interstate Corrections Compact ("ICC"), inmates who serve a concurrent Washington sentence in an out-of-state prison are *still* given earned early release time and DOC makes the required calculation. 130 Wn. App. at 778, citing, RCW 72.74.020(4)(d). Further, the Salinas Court noted, the ICC requires the receiving state to "report an inmate's conduct to the sending state so

that the sending state has a record for adjusting the inmate's sentence based on that conduct." 130 Wn. App. at 778. DOC could simply have the other state engage in the same practice in order to provide the same information in cases such as that of Mr. Salinas, the Court pointed out. Id.

The Salinas Court also rejected the idea that it was significant that DOC did not have "control" over the defendant while he was out-of-state. 130 Wn. App. at 778-79. The Court was persuaded by the reasoning on that issue in a case from New Jersey, Van Winkle v. N.J. Dep't of Corr., 370 N.J. Super 40, 850 A.2d 548 (2004). Salinas, 130 Wn. App. at 779.

In Van Winkle, the defendant was serving a New Jersey sentence concurrent with one in Pennsylvania and was then returned to New Jersey to finish the sentence from that state. Van Winkle, 850 A.2d at 553. The New Jersey DOC refused to give him "work credit" against the part of his New Jersey sentence served concurrently in Pennsylvania, because Pennsylvania did not give work credit and, the DOC argued, he was not under New Jersey's "control" during that time. Id. The defendant argued there was "no conceivable, much less rational, basis to distinguish, for purposes of work time credits," between those who served a New Jersey sentence in that state and without. Id.

The Van Winkle Court agreed, finding the statute unconstitutional under that state's equal protection clause. 850 A.2d at 552. "Physical

control" was not relevant or at least not significant to the issue, the Court held, because the fact that the inmate was not in New Jersey's "physical control" while in Pennsylvania "was not a rational basis for denying him credit . . .when he would have received such credit" had he been incarcerated in New Jersey. 850 A.2d at 552. The state legislature had obviously not been convinced that such control was "significant" to whether credit should be given, the Court held, because it had provided that inmates serving their state sentences in out-of-state institutions were entitled to the credit, when that time was served "pursuant to the Interstate Corrections Compact." 850 A.2d at 552. And they were entitled to such credit even if the receiving state did not have policies granting such credit. Id.

The Salinas Court found this reasoning persuasive, and concluded that "control" over an out-of-state inmate was not a justification for denying some such inmates earned early release credit while granting it to others.

Before ever mentioning Salinas, DOC argues that inmates who are serving Washington sentences concurrent with out-of-state sentences in an out-of-state facility are not "similarly situated" for equal protection purposes when they are out of the state based on the Interstate Agreement on Detainers (IAD) as opposed to the Interstate Corrections Compact

(ICC). BORD at 12-14. And its main criticism of the Salinas decision is that it "did not address or cite the IAD" and thus was somehow unaware of and "did not distinguish between the control that the DOC has over inmates under the ICC as compared to the lack of control the DOC has over inmates under the IAD." BORD at 20-21.

But this claim falls with the barest scrutiny of Salinas. In Salinas, the Court specifically found the reasoning of Van Winkle persuasive on the issue of whether DOC's "control" over an inmate serving a sentence out-of-state supported treating inmates differently. Salinas, 130 Wn. App. at 778-79. Thus, the Salinas Court was obviously aware of the opinion and reasoning of Van Winkle, not only on that issue, but as a whole. And in Van Winkle, the New Jersey Court found that IAD and ICC offenders were not "similarly situated," based on the same kinds of differences between IAD and ICC offenders that DOC touts here. See Van Winkle, 850 A.2d at 780-81. The fact that the Salinas Court chose not to follow the New Jersey Court's decision that these offenders were not similarly situated for the purposes of equal protection analysis does not mean that the Salinas Court was unaware of or did not consider those differences. Salinas, 130 Wn. App. at 778-79.

Ultimately, though, the Salinas Court held, there was "no rational basis to distinguish between those serving sentences out of state pursuant to

the Interstate Corrections Compact from people serving concurrent sentences out of state[.]" Salinas, 130 Wn. App. at 778-79. And the Court reached that conclusion because it noted that the administrative inconvenience of which DOC complained existed in both ICC and IAD cases and yet in ICC cases that hurdle was overcome to the benefit of those offenders alone. DOC could simply treat Salinas the same way it treats prisoners who are "housed in other states pursuant to the Interstate Corrections Compact - i.e., the receiving state reports the inmate's conduct to the sending state." 130 Wn. App. at 780, citing, RCW 72.74.020(4)(d) (requiring such reports). The Court concluded that it was a violation of equal protection for DOC to recognize "good time for confinement in prisons in other jurisdictions in some cases, but . . . not recognize it in others," because there was no rational basis to deny the same treatment to offenders "who serve a concurrent sentence in another state's prison." Salinas, 130 Wn. App. at 780-81.

Thus, under Salinas, DOC's refusal to give Mr. Stevens earned early release credit against the Washington sentence he served concurrently with the sentence in Idaho is a violation of Stevens' state and federal equal protection clause rights.

Notably, DOC has not shown that Salinas is "demonstrably 'incorrect or harmful.'" See BORD at 19-20; see International Assoc. of

Firefighters, Local 46., 146 Wn.2d 29, 37 n. 9, 42 P.3d 1265 (2002), quoting, King v. W. United Assurance, 100 Wn. App. 556, 561, 997 P.2d 1007, review denied, 141 Wn.2d 1027 (2000) (such a finding is needed in order to overturn prior precedent under the doctrine of *stare decisis*, a doctrine which promotes respect for and clarity in the law).

Further, even a cursory examination of Salinas shows that DOC is simply wrong that the Salinas Court somehow failed to consider the claims DOC makes here. For example, here, DOC cites the language of current RCW 9.94A.729(1) and argues that the statute requires that DOC reduce an offender's sentence by earned early release time only if such time given "by the correctional agency having jurisdiction in which the offender is confined." BORD at 16. DOC interprets the statute as authorizing depriving inmates of credit against Washington sentences for earned early release time "unless the other state's own prison system awards them early release time." BORD at 15-16.

But this very same claim was made in Salinas, citing the very same statutory language. Salinas, 130 Wn. App. at 776-77 (quoting then RCW 9.94A.728, which provided for earned early release time only if such time is given "by the correctional agency having jurisdiction in which the offender is confined"; noting DOC's interpretation that the statute allowed DOC to refuse to award "*any* earned early release time to an offender who

serves a concurrent out-of-state sentence in an out-of-state facility if the correctional agency operating the facility has no policies and procedures providing for such credit"). The relevant language was in RCW 9.94A.728 until 2010. See Laws of 2010, ch. 224, § 6.[1]

The Salinas Court not only mentioned but actually quoted this language. 130 Wn. App. at 776-77. That Court, however, still concluded that DOC violates equal protection guarantees when it deprives some inmates of earned early release time based on the theory that this statutory language authorized such deprivation. Id.

Thus, the statutory language DOC relies on as supporting its refusal to give Mr. Stevens earned early release credit has already been found not to do so in Salinas.

DOC also argues that it did not have "control" over Stevens and thus Stevens is not entitled to earned early release credits because Idaho had the authority and control over Stevens under the IAC. See BORD at 6-

[1]In general, "a defendant must be sentenced in accordance with the law in effect at the time of his or her offense," so that Stevens was entitled to have the determination of his credit for time served governed by the law in effect on the date of the crimes. See State v. Medina, 180 Wn.2d 282, 287, 324 P.3d 682 (2014). The crimes in this case were alleged to have occurred between January to March of 2009. In 2009, RCW 9.94A.728(1) provided, in relevant part, that "the term of the sentence of an offender committed to a correctional facility operated by the department may be reduced by earned release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined. The earned release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction[.]"

19. But again, the Salinas Court discussed "control" and found that "physical control over an inmate" was not a significant difference justifying giving some inmates credit while depriving credit to others.

Ultimately, DOC's complaint appears to be that the Salinas Court was somehow unaware that there were differences between offenders serving time on a Washington offense in another state under the IAD as opposed to an ICC - something DOC says means the Salinas Court did not have "all the information" in making its decision. But in fact, the Salinas Court was well aware that there were differences between how IAD and ICC offenders were treated. The Court specifically noted that, unlike Salinas, inmates serving "Washington sentences in out-of-state facilities pursuant to the Interstate Corrections Compact" were given earned early release credits "regardless of whether such facilities have earned early release policies." 130 Wn. App. at 776. And the Court noted that inmates serving out-of-state under the ICC "present the same administrative inconvenience" that Salinas did and those inmates were given sentence reduction credit whether or not the out-of-state institution granted such credit. Id.

Salinas is directly on point. Under the holding of that case, Mr. Stevens was denied equal protection when DOC refused to give him earned early release credit against his Washington sentence for time he served on

the sentence concurrent to the Idaho conviction, in a prison in Idaho. This Court should so hold and should grant him relief.

E. CONCLUSION

This Court should grant this transferred Motion and order DOC to credit Mr. Stevens with earned early release against the portion of his Washington sentence served in Idaho, consistent with Salinas and as required in order to ensure that Stevens' rights to equal protection are honored.

DATED this 1st day of December, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAILING

Under penalty of perjury under the laws of the State of Washington, I hereby certify that I mailed a copy of the attached Brief to appellant by depositing same in the United States Mail, first class postage pre-paid, as follows: Mr. Jon Stevens, DOC 822329, Cedar Creek CC, P.O. Box 37, Littlerock, WA. 98556-0037, to the Pierce County Prosecutor's Office, at pcpatcecf@co.pierce.wa.us, and the Washington State Department of Corrections, through their attorney, Ronda D. Larson, AAG, Corrections Division, P.O. Box 40116, Olympia, WA. 98504-0016.

DATED this 1st^{h} day of December 2014.

Respectfully submitted,

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Other__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Brief in support of transferred CrR 7.8 motion /PRP

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A copy of this document has been emailed to the following addresses:

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